FILED
AUG 5 1974
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-71

THE KING'S GARDEN, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, King's Garden, Inc., asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 6, 1974, denying a petition to review certain orders of the Federal Communications Commission.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is included at page 1a of the Appendix. The order of the Federal Communications Commission *In re Complaint by Anderson* is reported at 34 FCC 2d 937 (1972) and appears at page 30a of the Appendix. The order of the Federal Communications Commission *In The Matter of King's Garden, Inc.*, is reported at 38 FCC 2d 339 (1972) and appears at page 22a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals here sought to be reviewed (Appendix page 1a) was entered May 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS FOR REVIEW

Whether the Congressional enactment contained in 42 U.S.C. §2000e-1 is constitutional. This provision is an exemption to the Civil Rights Act which allows religious organizations to hire persons of a particular religion to perform work connected with the organization's activities.

Whether, if 42 U.S.C. §2000e-1 is constitutional, the Federal Communications Commission can lawfully require Petitioner, a religious organization and a broadcast licensee of said Commission, to hire persons unsympathetic to Petitioner's religious views, contrary to the national policy expressed in 42 U.S.C. §2000e-1 and without any express statutory authorization in the enabling act of the Commission.

Whether, if the Commission has the statutory authority to ignore the national policy expressed in 42 U.S.C. §2000e-1, the

Commission's actions under review in this proceeding nonetheless violate Petitioner's right to the free exercise of religion.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Amendment I of the U.S. Constitution states as follows in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Section 3 of the Equal Employment Opportunities Act of 1972, 42 U.S.C. §2000e-1, amending Section 702 of Title VII of the Civil Rights Act of 1964, former 42 U.S.C. §2000e-1, states as follows in pertinent part:

> "This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities."

Section 303 of the Communications Act of 1934, as amended, provides as follows in pertinent part:

> "Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall–
>
> * * *
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or

> regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party . . ."

Sections 73.125 and 73.301 of the Rules of the Commission, 47 C.F.R. §73.125 and 73.301, are identically worded, the first applying to licensees of standard (AM) broadcast stations and the second to licensees of FM broadcast stations. These rules state in pertinent part:

> "(a) *General policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard, FM, television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex."

STATEMENT OF FACTS

Petitioner, The King's Garden, Inc., is a nonprofit, interdenominational religious and charitable organization whose basic goal is to "share Christ world wide." Among its other activities, King's Garden, Inc., is the licensee of standard (AM) broadcast station KGDN and FM broadcast station KBIQ-FM, both licensed to Edmonds, Washington.

The facts with respect to this proceeding are essentially uncontested. It was the policy of the King's Garden, Inc., to hire in connection with its broadcast activities only persons sympathetic to its religious beliefs and goals. This policy was premised on Petitioner's good faith belief that such a policy was essential to the maintenance of the

integrity of Petitioner's religious organization and to the furtherance of Petitioner's religious activities. The sincerity of Petitioner's belief has not been questioned in this proceeding.

In the first order of the Commission for which review was sought before the Court of Appeals (Appendix, page 30a), the Commission held that Petitioner's policy violated its equal employment rules, 47 C.F.R. §73.125 and 73.301. The Commission held that Petitioner would be exempt from these rules only with respect to "those persons hired to espouse a particular religious philosophy over the air" (Appendix, pages 32a-33a).

Subsequent to the first order of the Commission in this proceeding, Petitioner requested the Commission to reconsider its ruling in view of the enactment of the Equal Employment Opportunities Act of 1972. This Act amended Section 702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, to exempt religious organizations from the requirements of the Act "with respect to the employment of individuals of a particular religion to perform work connected with . . . *its activities.*" (emphasis added) This provision had previously allowed an exemption only with respect to a religious organization's "religious activities." The 1972 amendment thus broadened this exemption to include all activities of a religious organizations. Petitioner's employment policies at issue before the Commission were consistent with this 1972 amendment to the Civil Rights Act.

In its second order in this proceeding (Appendix, page 22a), the Commission held that it was not obligated to follow the national policy expressed in the Equal Employment Opportunities Act of 1972 and the King's Garden was directed to comply with the Commission's rules as

previously construed, despite the consistency of its employment practices with the Civil Rights Act, as amended. The Commission also rejected Petitioner's contention that the policy applied to Petitioner violated the free exercise of religion clause of the Constitution.

Petitioner filed a Petition for Review of both orders in the United States Court of Appeals for the Ninth Circuit pursuant to 47 U.S.C. §402(a). The proceeding was subsequently transferred to the District of Columbia Circuit which denied the Petition for Review on May 6, 1974, in the judgment now at issue.

REASONS FOR GRANTING THE WRIT

The actions of the Federal Communications Commission under review in this proceeding and the judgment of the Court of Appeals upholding the Commission present important questions of federal law which are of wide applicability and public importance and which should be settled by this Court.

1. *The Constitutionality of 42 U.S.C. §2000e-1*

The Court of Appeals majority opinion premises its judgment in this proceeding on a finding that the exemption accorded to religious organizations "is of very doubtful constitutionality" (Appendix, page 5a). While the majority opinion of the Court of Appeals professes to stop short of a formal holding that the statute is unconstitutional (a holding that would have accorded Petitioner a right of appeal to this Court), a review of Section I of the Court of Appeals' opinion will clearly demonstrate that the effect of this opinion is difficult to distinguish from a formal holding of unconstitutionality. Moreover,

in his concurring opinion, the Chief Judge explicitly premised his decision upon the unconstitutionality of the statutory exemption. Thus, serious doubt and uncertainty have been cast upon the Congressional exemption for religious organizations.

The impact of this decision reaches far beyond the immediate parties to this proceeding. Thus, all religious organizations–regardless of whether or not they hold broadcast licenses–must act at their peril in this area because of the doubt cast upon the constitutionality of the religious exemption at issue in this proceeding. Similarly, all federal agencies with responsibility for administering federal equal employment policies–not just the Federal Communications Commission–must act with uncertainty as to what the law is.

The Court of Appeals' decision here is also likely to result in conflicting judicial interpretations. To the best of Petitioner's knowledge, this is the first case ruling on the 1972 religious exemption. In view of the serious doubt cast upon the constitutionality of this provision, it is virtually inevitable that further litigation in this area will result. It is also likely that there will be conflicting decisions, especially since any court desiring to uphold the statute must necessarily reach a conclusion at odds with that of the District of Columbia Circuit. This Court should act now to resolve the conflict and uncertainty that will invariably result.

The above considerations are particularly critical since the area involved is replete with constitutionally sensitive issues. Government regulation of the employment practices of religious organizations as they relate to religious conditions must necessarily involve secular authorities in the internal affairs of religious groups to a greater extent

than has ever before been sanctioned. The resulting entanglement of secular and religious institutions has long been a matter of concern to this Court. *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S.Ct. 2955, 2976 (1973); and *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). The 1972 exemption to the Civil Rights Act represents an attempt by Congress to resolve this matter by wholly excluding the state from interfering with the employment policies concerning the activities of religious organizations. As Senator Sam J. Ervin, Jr., a cosponsor of this amendment, stated:

> "In other words, this amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be." (Congressional Record, 92nd Congress, 2nd Session, February 17, 1972, Volume 118, p. S2061).

A judicial rejection of Congress' attempt to establish a national policy in accord with the Constitution clearly merits review by this Court.

In sum, this petition should be granted to permit resolution of the serious questions of federal and constitutional law raised by the Court of Appeals' decision questioning the constitutionality of 42 U.S.C. § 2000e-1.

2. *The Authority of the Commission to Act Contrary to the National Policy Established by Congress*

The action of the Federal Communications Commission under review in this proceeding is premised on the assertion that the "public interest" mandate of the Communications Act of 1934, as amended, gives it authority to prescribe employment regulations contrary to the national policy set forth in the 1972 exemption to the Civil Rights

Act. Assuming the constitutionality of this exemption, the Commission's interpretation of its mandate under the facts of this case represents an unprecedented expansion of the Commission's authority that clearly warrants review by this Court.

The Court of Appeals' ruling on this point is unclear since it is intertwined with the Court of Appeals' questioning of the constitutionality of the 1972 exemption. Insofar as the majority opinion of the Court of Appeals does address this question, it seems to indicate that an agency is required to do no more than "examine new legislation to determine its relevance, if any, to the agency's mandate" (Appendix, page 14a). This notion is clearly rejected by Chief Judge Bazelon who indicates in a concurring opinion that if the 1972 exemption were constitutional (he finds it not to be), then the Commission would be bound by that "explicit Congressional policy" (Appendix, page 21a).

Numerous cases could be cited to the effect that the "public interest" mandate is broad and should be liberally construed. However, all of these cases relate to areas which the Commission was specifically established to regulate. Here, the Commission is venturing into an area—equal employment policy—where it has no specific mandate, little experience, and no claim to expertise. In doing so, the Commission has rejected the explicit policy of Congress, a branch of government with a much greater claim to expertise in this area and the related constitutional areas.

The broadest extension of the Commission's jurisdiction to date may be found in *Banzhaf v. FCC*, 405 F.2d 1082, 132 U.S. App. D.C. 14 (1968); *cert. denied* 396 U.S. 842

(1969) *sub nom. Tobacco Institute, Inc. v. FCC.* It was there held that the Commission could require that its licensees present programming to advise the public of the dangers of cigarette smoking if they carried advertising for that product. However, the court went to great pains to emphasize that its holding was based on the fact that the Commission's ruling was overwhelmingly supported by the findings of those branches of government principally responsible for the public health, and that if that were not the case, the "public interest" standard, by itself would not serve to justify the Commission's actions (405 F.2d at 1096-97, 132 U.S. App. D.C. at 28-29). Here, in contrast, the Congress, which has the authority to establish national employment policy, has established a policy which the Commission has negated with respect to religious licensees. The Appeals Court's ruling is thus in conflict with its decision in *Banzhaf,* thus creating additional uncertainty as to how far the Commission may go in applying its concept of the "public interest."

Indeed, if the Commission may nullify a Congressional exemption in the area of employment practices, a substantial question arises as to what are the limits on Commission action. For example, could the Commission establish requirements for licensees as to unions or minimum wage which conflict with Congressional enactments in those areas. To what extent is the Commission required to heed the policies of Congress and other specialized agencies designed to govern in these areas. It is suggested that the answers to these questions are of paramount importance, not only regarding this Commission but also with respect to other specialized regulatory agencies.

These questions are so basic and far reaching as to warrant consideration by this Court.

3. *The Constitutionality of the Commission's Orders*

The King's Garden has urged both before the Commission and the Court of Appeals that regulation of its internal employment policies regarding religion violates its right of free exercise. The intrusion into the internal affairs of a religious organization authorized by the rulings in this proceeding substantially exceed any previous invasion into such areas previously permitted. Further, these rulings constitute implicit rejection of the King's Garden's belief that with respect to persons associated with its organization it is impossible to compartmentalize their "secular" function and their religious function. This expansion of the power of secular authorities over religious organizations clearly merits this Court's review.

Both the Commission and the Court of Appeals premise their rejection of Petitioner's constitutional objection on the argument that since Petitioner has voluntarily accepted an FCC license it must forego its religious nature to the extent necessary to comply with its "enforceable public obligations" (Appendix, page 17a). To a large degree, this formulation begs the question since it assumes an "enforceable" obligation. In a more fundamental sense, however, the question is whether a religious group, in order to become a Commission licensee, must forego its right to maintain the religious integrity of its internal organization which the Court concedes it would otherwise enjoy (Appendix, page 17a). There thus arises the question of whether the Appeals Court ruling permits the imposition of an unconstitutional condition, cf. *Sherbert v. Verner*, 374 U.S. 398 (1963).

Even if it were found that some limitation on Petitioner's free exercise rights in this area might be permitted

under some circumstances, it is nonetheless urged that any such limitation must be in response to:

> "A state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

Such a state interest has nowhere been demonstrated in this proceeding.

The resolution of these issues constitutes a further need for review by this Court.

Also inherent in this case are the free exercise problems that will result from the entanglement of church and state that must necessarily result from attempts to implement the Commission's regulations and define what are "religious" activities and what are not. The Court of Appeals agreed that the implementation of these policies is a "delicate undertaking" (Appendix, page 19a). However, it did not find that this *per se* affected the underlying constitutionality of the regulation, but that this could be left for the Commission to work out on a case-by-case basis. In substance, the procedure proposed here is essentially similar to a proposal this Court considered and rejected in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). The Court of Appeals there proposed that the Commission be required to resolve on a case-by-case basis sensitive questions under the free speech provisions of the First Amendment. This Court recognized that this could only lead to undue government surveillance of constitutionally sensitive areas and that this was a factor of constitutional dimensions (36 L.Ed. 2d at 797). The same Court of Appeals proposes here essentially the same solution to a problem in

the related area of free exercise. Since this Court found that procedure wanting in *CBS*, it is suggested that the procedure warrants review in this instance.

Finally, the Court of Appeals finding that the limited exemption to its rules proposed by the Commission is facially adequate merits review by this Court. The exemption provided by the Commission extends only to "persons hired to espouse a particular religious philosophy over the air." The Commission made clear the limited nature of this exemption in a declaratory ruling issued subsequent to the orders under review here. *National Religious Broadcasters, Inc.*, 43 FCC 2d 451 (1973). The Commission's policy in this respect leaves open the possibility that its rules would apply with respect to the hiring of management level executive personnel if these personnel were not being hired for the specific purpose of espousing a religious philosophy over the air. It is suggested the scope and adequacy of this narrow exemption merits review by this Court.

CONCLUSION

This proceeding presents several basic and important questions of law, both constitutional and statutory, which warrant grant of the requested writ of certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1896

THE KING'S GARDEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communications Commission

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Decided May 6, 1974

Morton L. Berfield, with whom *Lewis I. Cohen* was on the brief, for petitioner.

John E. Ingle, Counsel, Federal Communications Commission, with whom *John W. Pettit*, General Counsel, and *Joseph A. Marino*, Associate General Counsel, Federal Communications Commission, were on the brief, for respondent.

Melvin L. Wulf and *Joseph Remcho* filed a brief on behalf of American Civil Liberties Union *et al.* as *amici curiae*.

Before BAZELON, *Chief Judge*, WRIGHT, *Circuit Judge*, and WYZANSKI,* *Senior District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Opinion concurring in the result filed by *Chief Judge* BAZELON.

WRIGHT, *Circuit Judge*: Petitioner is a non-profit, interdenominational, religious, and charitable organization. Its activities include a number of ministries whose basic goal is to "share Christ world wide (Record at p. 15). Petitioner is also the licensee of Radio Stations KBIQ-FM and KGDN in Edmonds, Washington. In these proceedings it seeks review of an order of the Federal Communications Commission which found that it was discriminating on religious grounds in its employment practices and directed it to submit to the Commission a statement of its future hiring practices and policies.[1]

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* Of the United States District Court for the District of Massachusetts, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] This controversy arose when a job applicant at one of King's Garden's stations complained to the FCC that he was asked questions such as "Are you a Christian?", "Is your spouse a Christian?", and the like. The Commission forwarded the complaint to King's Garden on Aug. 2, 1971 (Record at p. 2). King's Garden responded by claiming the statutory and constitutional right to discriminate on religious grounds with respect to all positions of employment at its radio stations (Record at p. 15). The Commission ruled on May 3, 1972 that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules." *In Re Complaint by Anderson*, 34 FCC2d 937, 938 (1972). This position was reaffirmed after enactment of the 1972 exemption to the Civil Rights Act mentioned in text. *See In the Matter of King's Garden, Inc.*, 38 FCC2d 339 (1972). The question in this case is whether the Commission's qualified exemption facially conforms to relevant statutes and the Constitution. We do not deal with application of the exemption to any par-

Petitioner relies upon a 1972 amendment to Title VII of the 1964 Civil Rights Act which exempts all activities of any "religious corporation, association, educational institution, or society" from the Act's ban on religious discrimination in employment.[2] (Hereinafter the 1972 exemption.) Before 1972 only the "religious activities" of such organizations had been exempted.[3] Petitioner would require the Federal Communications Commission to engraft the 1972 exemption on to the Commission's own rules against sectarian employment practices, promulgated under the "public interest" standard of the Com-

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ticular job position at King's Garden. It should be noted that King's Garden has requested institution of rule-making proceedings on the Commission's exemption policy. This issue is not before us.

[2] The exemption is in § 3 of the Equal Employment Opportunities Act of 1972, Pub. L. 92-261, 86 STAT. 103, 42 U.S.C. § 2000e-1 (Supp. II 1972), *amending* § 702 of Title VII of the Civil Rights Act of 1964, 78 STAT. 255, *former* 42 U.S.C. § 2000e-1. The 1972 exemption reads, in pertinent part:

> This subchapter shall not apply * * * to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The general ban on religious discrimination in employment is at 42 U.S.C. § 2000e-2 (1970).

[3] Section 702 of the 1964 Civil Rights Act read, in pertinent part:

> This subchapter shall not apply * * * to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities * * *.

munications Act.[4] The Commission already exempts employment "connected with the espousal of the licensee's religious views."[5] Petitioner contends that a sectarian licensee, like itself, must be allowed to discriminate on religious grounds in all of its employment practices.

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[4] The regulations bar employment discrimination by broadcast licensees "because of race, color, religion, national origin or sex." 47 C.F.R. §§ 73.125(a), 73.301(a), 73.599(a), 73.680(a), 73.793(a) (Oct. 1, 1973). The Communications Act of 1934, 48 STAT. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.* (1970), mandates the Commission to regulate broadcast licensees "as public convenience, interest, or necessity requires." *E.g.*, 47 U.S.C. §§ 303, 307, 309(a). The Commission traces its authority to promulgate fair employment rules to the "public interest" standard of its enabling act and to the related fact that broadcasters are "public trustees" with special obligations. *See Non-Discrimination in Employment Practices: Notice of Proposed Rule Making*, 13 FCC2d 766, 769-770 (1968), *and Non-Discrimination in Employment Practices*, 18 FCC2d 240, 241 (1969). The Communications Act does not itself expressly grant the FCC authority to regulate the employment practices of licensees, but the Commission has noted that employment practices have an obvious, if indirect, impact on programming—over which the FCC does have express authority. *See Non-Discrimination in Employment Practices: Notice of Proposed Rule Making, supra*, 13 FCC2d at 770. King's Garden does not deny that the Commission has independent statutory authority to regulate the employment practices of licensees, and contends only that this authority cannot be exercised contrary to the Constitution or to the "national policy" established by the religious exemption in § 3 of the Equal Employment Opportunities Act of 1972. Brief for petitioner at 18. The Commission has stated that any change in its anti-bias rules should be accomplished through formal rule-making and should be adopted only "upon a public interest finding under the Communications Act" (Record at p. 83).

[5] *See In Re Complaint by Anderson, supra* note 1, 34 FCC2d at 938, *and In Re Request of National Religious Broadcasters, Inc.*, 43 FCC2d 451 (1973).

We affirm the Commission rulings. The 1972 exemption is of very doubtful constitutionality, and Congress has given absolutely no indication that it wished to impose the exemption upon the FCC. Under these circumstances the Commission is fully justified in finding that the exemption does not control its "public interest" mandate under the Communications Act. The limited exemption which the FCC currently recognizes to its own anti-bias rules adequately protects a sectarian licensee's rights under the Communications Act and the First Amendment. Accordingly we uphold the Commission's regulatory scheme as facially sound, while recognizing that its future application will require continuing judicial scrutiny.

I

The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all of their employees.[6] But the exemption's

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[6] Section 702 of the 1964 Civil Rights Act (Pub. L. 88-352, 78 STAT. 255, *former* 42 U.S.C. § 2000e-1) had exempted "educational institution[s]" from all of the Act's employment discrimination rules. Early versions of the legislation which became the Equal Employment Opportunities Act of 1972 deleted this blanket exemption for educational institutions and proposed to add "religious educational institution[s]" to the list of religious organizations which § 702 had exempted as to religious discrimination in "religious activities." *See* § 3 of S. 2515, 92nd Cong., 1st Sess., Sept. 14, 1971. Senator Allen objected that

> [u]nder the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology.

LEGISLATIVE HISTORY OF THE EQUAL OPPORTUNITY ACT OF 1972 844 (Nov. 1972). To remedy this evil the Senators proposed striking the word "religious" from the term "religious activities" used in the provision exempting religious organiza-

simple and unqualified terms obviously accomplish far more than this. In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.[7] If owned and operated by a non-religious organiza-

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tions from the ban on sectarian hiring practices. Amendment 809 to S. 2515, LEGISLATIVE HISTORY, *supra*, at 789. The Senate adopted the Ervin-Allen amendment, *id.* at 1667, and the House also accepted it after a Joint Conference on the 1972 Act, *id.* at 1813-1814. This amendment broadened the exemption as to religious educational institutions—but also, of course, as to *all other* religious organizations listed in the exemption. In giving concrete examples of the workings of their amendment, however, both Senator Allen and Senator Ervin invariably adverted to its effect on religious educational institutions. *Id.* at 846, 848-852. The effect on other religious organizations went undiscussed, except for two very general comments by Senator Ervin:

> Our amendment would strike out the word "religious" and remove religious institutions in all respects from the subjugation to the EEOC.

Id. at 848.

> In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

Id. at 1645.

[7] *See* note 9 *infra*. It might be argued, in an attempt to read the exemption narrowly, that a commercial enterprise established by a religious sect is not an "activity" of the sect. This does not, however, seem a very fruitful line of argument. If a sect owns and operates an enterprise, on what ground could it be held to be other than an "activity" of the sect? Use of some technical ground—such as separate incorporation

tion, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a "bona fide occupational qualification" of a religious character.[8]

In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause. Laws in this country must have a secular purpose and a "primary effect" which neither advances nor inhibits religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973);

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of the commercial enterprise—would not narrow the exemption in practice, for religious groups would simply avoid the technicality, *e.g.*, avoid separate incorporation, in setting up their commercial enterprises. To effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into "secular" and "religious" categories, but it is precisely this categorization which Congress repudiated in 1972.

While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. The scope of a religious exemption is an issue raising very delicate questions of public policy. While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections. There may well be a considerable range of permissible alternatives. As a matter of institutional competence and constitutional authority, it is for the Congress, not the courts, to choose among these. *See*, in this regard, 26 U.S.C. §§ 501(c)(3), 502, 511, & 512 (1970), where Congress has shown considerable ingenuity in constructing a very complicated exemption from the income tax laws for certain religious corporations.

[8] 42 U.S.C. § 2000e-2(e)(1). The "qualification" must be "reasonably necessary to the normal operation of that particular business or enterprise."

Lemon v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970).

> [I]t is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," * * * and even though it does not aid one religion more than another but merely benefits all religions alike. * * *

Nyquist, *supra*, 413 U.S. at 771.

> A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment * * *.

Lemon v. *Kurtzman*, *supra*, 403 U.S. at 612 (emphasis in original). We cannot conceive what secular purpose is served by the unbounded exemption enacted in 1972. As for "primary effect," the exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion.

It is true that most of the Establishment Clause cases recently before the Supreme Court have involved state subsidies or tax preferences for religious groups. But in drafting the Clause the Founders were taking equally keen aim at all non-financial "sponsorship" of religious organizations by government. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 668. And sponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy.[9]

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[9] The wealth and inclination exist, apparently, in many American religious groups. *See* A. BALK, THE RELIGION BUSINESS 8-11 (1968); D. ROBERTSON, SHOULD CHURCHES BE TAXED? 139-170 (1968); M. LARSON & C. LOWELL, PRAISE THE LORD FOR TAX EXEMPTION 193-246 (1969).

It was not, of course, constitutionally required that Congress prohibit religious discrimination in private sector employment. But this having been done, by the Civil Rights Act, the wholesale exemption for religious organizations alone can only be seen as a special preference. *Compare Reitman* v. *Mulkey*, 387 U.S. 369 (1967). The First Amendment demands "neutrality" of treatment between religious and non-religious groups. *Nyquist*, *supra*, 413 U.S. at 792-793. As Mr. Justice Harlan once noted:

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerry manders. * * *

Walz v. *Tax Commission*, *supra*, 397 U.S. at 696 (concurring opinion).

Because the two religion guarantees often seem to tug in opposite directions, "neutrality" is a notoriously difficult concept.

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. * * * The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. * * *

Wisconsin v. *Yoder*, 406 U.S. 205, 220-221 (1972). *See also Sherbert* v. *Verner*, 374 U.S. 398 (1963). In this matter of exemptions the First Amendment strings a "tight rope" between the two religion guarantees, *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 672, and we must see to it that Congress does not slip off.

From 1964 to 1972 Congress had, in our view, a firm purchase on the tightrope. The exemption then granted by the Civil Rights Act to the *religious* activities of religious organizations was itself required by the First Amendment. The Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy. *See Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *McClure* v. *Salvation Army*, 5 Cir., 460 F.2d 553 (1972). In addition, the guarantees of Free Exercise, Free Speech, and Free Press no doubt combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs or way of life, either to its own members or to the world at large. *See Tucker* v. *Texas*, 326 U.S. 517 (1946); *Follett* v. *McCormick*, 321 U.S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Founding Church of Scientology* v. *United States*, 133 U.S.App.D.C. 229, 409 F.2d 1146, *cert. denied*, 396 U.S. 963 (1969); *Anti-Defamation League of B'nai B'rith* v. *FCC*, 131 U.S.App.D.C. 146, 403 F.2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969). *Compare Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 7 Cir., 210 F.2d 879, *cert. denied*, 347 U.S. 1013 (1954).

But the 1972 exemption now shelters myriad "activities" which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. It is arguable that Congress may, without violating the Establishment Clause, expand a religious exemption *somewhat* beyond the minimal boundaries created by the several First Amendment liberties. *See Walz*

v. *Tax Commission, supra* (property tax exemption for buildings and land used "exclusively for religious, educational or charitable purposes" and "not operating for profit"); *Zorach* v. *Clauson*, 343 U.S. 306 (1952) ("released time" exemption from school attendance requirement for students wishing to take religious instruction). *See also Sherbert* v. *Verner, supra*, 374 U.S. at 422-423 (dissenting opinion of Mr. Justice Harlan). But these isolated decisions create no precedent for the unlimited 1972 exemption. In *Zorach, supra*, the Court carefully confined its ruling to the facts of the case. In *Walz, supra*, the Court stressed the peculiar historical role of property tax exemptions for places of worship, 397 U.S. at 676-678, noted that the tax exemption extended to the non-profit activities of many secular organizations so that the statutory classification was not strictly a "religious" one, *id.* at 673, and carefully refrained from stating or implying that the state could exempt church-owned property used for non-religious, commercial purposes. (The Court has yet to address this last question. *See Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972); *cf. Gibbons* v. *District of Columbia*, 116 U.S. 404, 408 (1886).)

By contrast, no historical tradition supports the 1972 exemption, *see Nyquist, supra*, 413 U.S. at 791-792. That exemption obviously creates a classification of a strictly religious character, *id.* And the exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations.[10] It is conceivable that there

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[10] In *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the Court also noted that a tax exemption for property used for religious purposes had the virtue of minimizing "entanglement" between churches and state authorities, *id.* at 674. But this rationale was obviously not intended to sanction *every* exemption from general laws granted to the "activities" of a religious organization. If it were, no "religious" exemption would ever raise an Establishment Clause issue; the

are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism." *Sherbert* v. *Verner*, *supra*, 374 U.S. at 422 (dissenting opinion of Mr. Justice Harlan). But it hardly follows that the state may favor religious groups when they themselves *choose* to be submerged, for profit or power, in the "all-embracing secularism" of the corporate economy.

In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well. To the extent that the non-religious commercial enterprises of religious organizations directly compete with those of non-religious organizations, the 1972 exemption forces the Government to discriminate between business rivals in applying the Civil Rights Act's constraints upon sectarian hiring. The criterion of discrimination—*i.e.* the religious or non-religious character of the owning or operating group—not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause. *Compare Bolling* v. *Sharpe*, 347 U.S. 497 (1947).

II

The FCC's own rules against sectarian hiring, promulgated under the Communications Act, exempt employment "connected with the espousal of the licensee's religious views." [11] Petitioner finds in this formula insufficient compliance with the "national policy" established by the

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Court has never adopted such a simpleminded rule. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 220-221 (1972), *and Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

[11] *See* note 5 *supra*.

1972 exemption to the Civil Rights Act. But it is very dangerous indeed to inflate a constitutionally doubtful statute into a "national policy" having force beyond the statute's literal command. The customary, and more prudent, course is to construe statutes so as to avoid, rather than aggravate, constitutional difficulties. *See United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). This course is open to us in the present case. Neither the express terms nor the legislative history of the 1972 exemption indicate that Congress intended the FCC to carve a like exemption into its own anti-bias rules. A definitive resolution of the constitutional issues raised by the 1972 exemption can therefore be deferred to a case where they are squarely raised.

While the key term in the 1972 exemption—"activities" —is concededly broad enough to cover broadcasting franchises operated by religious organizations, this means only that these sectarian franchises are immune from the ban on religiously discriminatory hiring contained in the Civil Rights Act. It does not necessarily follow that Congress intended to abrogate the FCC's own anti-bias rules. Not only have these rules always been promulgated under the Communications Act, rather than the Civil Rights Act, but the rules have also, from their inception, gone beyond the commands contained in the Civil Rights Act. For instance, the FCC demands that its licensees take strong affirmative steps to hire members of minority groups [12]; and the FCC's rules apply to every broadcaster—even those too small to fall within the coverage

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[12] On affirmative action, *see* 47 C.F.R. §§ 73.125(b), 73.301 (b), 73.599(b), 73.680(b), & 73.793(b). These rules are patterned on those used by the Civil Service Commission in hiring federal employees. *See Non-Discrimination in Employment Practices*, *supra* note 4, 18 FCC2d at 243. Even stronger affirmative measures apparently may be required by the Commission in particular instances. *Id.* at 244.

of the civil rights statutes.[13] The Commission's extensive rules, and limited religious exemption, were in full force when Congress debated the 1972 exemption from the Civil Rights Act, but the legislative history makes absolutely no mention of them, of the FCC, or of the Communications Act. In this context we adhere to the

> venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. * * *

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) (footnote omitted). This principle has particular application to the FCC, for the Commission's mandate "to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive,'" *id.* at 380. *See also FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218-219 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940).

An agency should, of course, always examine new legislation to determine its relevance, if any, to the agency's mandate. *See McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944). *Cf. City of Pittsburgh* v. *FPC*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); *Mansfield Journal Co.* v. *FCC*, 86 U.S.App.D.C. 102, 107, 180 F.2d 28, 33 (1950). But, having done this, the Commission was justified in finding the 1972 exemption irrelevant to its regulation of broadcast licensees under the Communications Act.

Congress' obvious purpose in enacting the 1972 exemption was to constrain the power of the *Equal Em-*

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[13] The fair employment standards in the civil rights statutes apply only to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

ployment Opportunities Commission (EEOC) to regulate *private* religious entities. At the time the exemption was debated the civil rights statute to which it is expressly addressed applied only to private sector employers.[14] The exemption's sponsors were chiefly interested in the employment rights of wholly private educational institutions.[15] Even in their most sweeping statements the sponsors spoke of immunizing only those activities which had traditionally been free of all government regulation:

> Our amendment would strike out the word "religious" and remove religious institutions in all respects from subjugation to the EEOC.
>
> * * * *
>
> In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.[16]

As Congress is fully aware, broadcasting under the Communications Act is not an altogether private industry. Federally licensed broadcasters are "public trustees." *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 117 (1973). For decades

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[14] The statute now covers "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e (Supp. II 1972), as well as private employers, but these public bodies were added by § 2(1) of the Equal Employment Opportunities Act of 1972, the same legislation which added the Allen-Ervin exemption for all of the "activities" of "religious" organizations. The legislative history of that exemption nowhere indicates that Congress gave any consideration to the possibility that a "religious" organization might also be a public or *quasi*-public body. The literal terms of the exemption do cover sectarian radio and television stations, but this is an undeliberated consequence of broad draftsmanship. It can hardly be invoked to show that Congress wished the FCC to desist from all regulation of the sectarian hiring practices of sectarian licensees.

[15] *See* note 6 *supra*.

[16] *Id.*

Congress has authorized and encouraged the FCC to regulate the broadcast industry in ways which the First Amendment would clearly foreclose in the case of wholly private organs of communication. *Red Lion, supra*, 395 U.S. at 386-401. Unlike a religious newspaper, a sectarian radio or television station must, as King's Garden readily concedes, adhere to the "fairness" and "personal attack" doctrines and produce some programs of general community interest. We have no evidence that Congress wished in 1972 to upset this well established doctrine that licensed broadcasters must meet FCC-imposed obligations inapplicable to the private sector generally. King's Garden wishes us to assume that Congress now regards sectarian broadcasters as regulable "public trustees" so far as programming is concerned but as "institutions of God" untouchable by "the hands of Caesar" so far as employment practices are concerned. We would require a sentence or two of pertinent legislative history before crediting Congress with so bizarre a notion.

III

The question remains whether the FCC's anti-bias rules violate King's Garden's rights under the First Amendment and the Communications Act. It is to protect these rights that the Commission exempts from the ban on sectarian hiring "the employment of persons whose work is * * * connected with the espousal of the licensee's religious views." This general policy is to be particularized on a case-by-case basis:

> [As t]here are [job] categories * * * which may be defined differently by each licensee, we do not believe that it is advisable to issue a general declaratory ruling * * *. We have only general information and we are dealing with an area where First Amendment rights are often involved. We believe it would be

> preferable, therefore, to have specific factual settings presented to us before issuing rulings. * * *[17]

The challenge here is to the facial adequacy of the exemption. Application of the general exemption policy to a particular job position may raise additional problems, but they are not presently before us.

King's Garden argues that the FCC's exemption is so narrow as to abridge the sect's right of religious association, under the Free Exercise Clause, and its right, under the First Amendment generally, to broadcast religious views of its choice.

The premise of the first argument is that King's Garden's radio station is an integral part of the sect's "missionary" structure. From this premise King's Garden concludes that the Commission's fair employment rules tamper unconstitutionally with the sect's hierarchy, membership policy, and administration. The conclusion is based on the recognized doctrine, noted earlier, that the internal affairs of a church are immune from public regulation under the Free Exercise Clause. But the argument's premise is defective. A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. *See Noe* v. *FCC*, 104 U.S.App.D.C. 221, 260 F.2d 739 (1958), *cert. denied*, 359 U.S. 924 (1959). But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations." *Office of Communication of United Church of Christ* v. *FCC*, 123 U.S.App.D.C. 328, 337, 359 F.2d 994, 1003 (1966).

King's Garden relies heavily on *Wisconsin v. Yoder*, *supra*, which recognized that a public obligation of a seemingly neutral and secular character—*i.e.* the duty

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[17] *In Re Request of National Religious Broadcasters, Inc.*, *supra* note 5, 43 FCC2d at 452.

to send one's children to a secondary school—may violate the religious associational rights of particular individuals by forcing them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs" so that they must "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." 406 U.S. at 218. The case is inapposite. Wisconsin's school attendance law intruded upon the traditional way of life of a religious sect by imposing an inescapable duty, backed by criminal penalties, on every parent of secondary school age children. By contrast, King's Garden confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. *See Red Lion, supra*, 395 U.S. at 386-401, *and National Broadcasting Co., supra*, 319 U.S. at 227. The FCC's rules merely condition King's Garden's ability to *extend* its activities by use of "a limited and valuable part of the public domain." *United Church of Christ, supra*, 123 U.S.App. D.C. at 337, 359 F.2d at 1003. There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.

King's Garden's second claim—that the FCC's exemption is too narrow to guarantee the sect's right to broadcast religious views of its choice—proceeds on somewhat firmer ground. While the constitutional dimensions of a broadcaster's speech and press rights have never been clearly delineated, the Supreme Court has recently emphasized that Congress, in enacting the Communications Act, intended licensees to have many of the liberties of private journalistic entities. *Columbia Broadcasting System, supra*, 412 U.S. at 109-111 and 124-125. Consequently, it may well be that, after it has met its "fair-

ness doctrine" and "personal attack doctrine" obligations and produced some programs of general community interest, King's Garden has the right to give a sectarian tone or perspective to all of its other programming. This right would be infringed if the Commission, in applying its exemption, were to find no "espousal" of "religious views" in a type of programming which King's Garden considered a significant expression of its sectarian viewpoint.

But this argument is premature. It requires us to speculate that the FCC will apply the terms "espousal" and "religious views" in a cramped and dogmatic fashion. The contrary speculation is equally plausible. In applying its exemption, the Commission may well pay close and sensitive attention to the sincerely held convictions of the sectarian licensees under examination. *See Wisconsin* v. *Yoder, supra*, 406 U.S. at 209-219, *and Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953). To date the Commission has done nothing more than announce that its exemption will fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee. This is precisely the relevant nexus so far as the journalistic rights of the licensee are concerned. Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression.

The Commission has set itself the difficult task of drawing lines between the secular and religious aspects of the broadcasting operations of its sectarian licensees. Though this is a delicate undertaking, it is one which the First Amendment thrusts upon every public body which has dealings with religious organizations. *See Nyquist, supra*, 413 U.S. at 775; *Tilton* v. *Richardson*,

403 U.S. 672, 681 (1971); *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614. The courts have traditionally granted the FCC considerable leeway to work out the difficult First Amendment problems endemic to a system of licensed communications. *Columbia Broadcasting System, supra,* 412 U.S. at 102-103 and 132; *Red Lion, supra,* 395 U.S. at 386-401; *National Broadcasting Co., supra,* 319 U.S. at 227. As presently formulated, the Commission's religious exemption is facially adequate. Problems of application there may be, but they will be questions for another day.

Affirmed.

BAZELON, *Chief Judge, concurring*: I disagree with my colleagues that the FCC can impose employment requirements in direct conflict with the standards established by Congress in Title VII. The Commission's mandate to act in the "public interest" does not empower it to contravene an explicit Congressional policy.[1] This is so, however, only if the policy in question is constitutional. I am convinced by the reasoning of part I of the court's opinion that Title VII's exemption of all "activities" of any "religious corporation, association, educational institution or society" violates the Establishment Clause of the First Amendment. Therefore, I would hold the exemption unconstitutional, and not binding on the FCC.

APPENDIX B

FCC 72-1062
89259

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
King's Garden, Inc.	)
Licensee of Stations KGDN and KBIQ-FM	)
Edmonds, Washington	)
	)
Compliance with Sections 73.125 and 73.301	)

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1972;
Released: November 30, 1972

By the Commission: Commissioner Robert E. Lee absent; Commissioners Johnson and Wiley concurring in the result.

1. In *King's Garden, Inc.*, 34 FCC 2d 937 (1972), we found that King's Garden, Inc., licensee of Stations KGDN and KBIQ-FM, Edmonds, Washington, was discriminating in its employment practices on religious grounds in violation of Sections 73.125 and 73.301 of our Rules.[1] King's

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[1] Sections 73.125, 73.301 and 73.680 are identically worded. They state in part:

> (a) *General policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard,

Garden was directed to submit a statement as to its future hiring practices and policies so as to comply with those sections. Now under consideration are the response of King's Garden and a letter from Mr. Trygve J. Anderson, whose complaint resulted in the issuance of the decision cited above. King's Garden has also filed a petition for rule making (RM-1999) to amend Sections 73.125 and 73.301 to exempt religious organizations. That petition will be considered at a later time and we make no judgment as to its merits in this decision.

2. There are no unresolved factual questions presented in this case. King's Garden discriminates on the basis of religion in hiring people to staff its broadcast stations. It does not comply with our first decision in this matter where we held that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules," 34 FCC 2d at 938. King's Garden contends in its response that the Civil Rights Act of 1964, as recently amended, and Constitutional considerations require that it should be entirely exempt from the requirements of the rules in question as to religious discrimination in employment. We disagree and affirm our prior holding for the reasons set out below.

3. Among the provisions of the Civil Rights Act of 1964 was a limited exemption from the requirements of that Act to permit religious organizations to discriminate on the basis of religion "with respect to the employment of individuals of a particular religion to perform work

> FM, television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex.

connected with . . . its religious activities." On March 24, 1972, the Equal Employment Opportunity Act of 1972 was approved, Public Law 92-261, 86 Stat. 103. The newly enacted statute changed the quoted language to permit religious discrimination by religious organizations in hiring persons "to perform work connected with . . . its activities." The change was made to expand "the exemption for religious organizations from coverage under this title with respect to the employment of individuals of a particular religion in all their activities instead of the present limitation to religious activities," *Joint Explanatory Statement of Managers at the Conference (on P.L. 92-261)*, 1972 U.S. Code Congressional and Administrative News, 1047, 1048.

4. King's Garden notes that our nondiscrimination rules are based in large measure on the Civil Rights Act of 1964. It urges in its rule-making petition that our Rules should be amended to reflect the changes in the Civil Rights Act noted above. It urges in this proceeding, in the alternative, that we should interpret our present nondiscrimination rules to permit discrimination on religious grounds when practiced by licensees that are religious organizations. This, it is asserted, would bring our rules into conformity with the amendments to the Civil Rights Act.

5. The interpretation requested by King's Garden would strike the word "religion" from the nondiscrimination rules as to a substantial number of licensees, and would be a change of our policy. We do not believe that such a substantial change can properly be termed an interpretation. Accordingly, to the extent that King's Garden seeks a change in our policy, we shall consider the proposed change in the rule-making proceeding. In this decision we shall consider King's Garden's contention

that the present rules are invalid because of Constitutional considerations or because of recent amendments to the Civil Rights Act.

6. The Civil Rights Act and amendments to it are not part of our enabling statute, and the former does not encompass the whole of the public interest standard imposed on us by the latter. This is obvious from the fact that our rules differ from the requirements of the Civil Rights Act. For example, our rules, other than reporting requirements, apply to all licensees regardless of the number of employees. The Civil Rights Act applies only to employers with 25 or more employees.[2] In addition, when the nondiscrimination rules were adopted, we pointed out that the rules were based on the policy set out in the Civil Rights Act *and* our requirement that broadcast stations operate in the public interest. Our concept of the public interest includes the duty of a broadcast station to serve the entire community. "A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public," *Nondiscrimination in Employment Practices*, 13 FCC 2d 766, 770 (1968).[3] It is evident, therefore, that in the area of nondiscrimination in employment, we have considered factors other than the Civil Rights Act and that those factors have been considered in rule-making proceedings. We conclude that King's Garden is not relieved of its obligation to comply with existing rules by a change in the Civil Rights Act or by the filing of a rule-making petition. Its obligation would be

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[2] In March, 1973, the limit will be reduced to 15 employees.

[3] Further changes in our nondiscrimination rules were made in *Nondiscrimination in Employment Practices*, 23 FCC 2d 430 (1970).

changed if the recommended changes were adopted in a rule-making proceeding, upon a public interest finding under the Communications Act.

7. There remains for consideration only King's Garden's contentions that the existing rules, as applied to it, violate the First Amendment to the Constitution. It asserts that we have assumed the responsibility of defining "religious activities" and "religious Philosophy," which leads to governmental definition of religious belief and activity. Our prior ruling, according to King's Garden, "failed to give proper recognition and weight to (its) contentions that its broadcast activities represented . . . a 'religious activity,'" citing *U.S. v. Seeger*, 380 U.S. 163 (1965). King's Garden notes that religious beliefs may not be limited to traditional or parochial concepts of religion, *Welsh v. U.S.*, 398 U.S. 333 (1970). The Supreme Court's decision in *Wisconsin v. Yoder*, ___ U.S. ___, 92 S.Ct. 1526 (1972), holding that Amish school children are exempt from state compulsory school attendance laws, is cited as an example of the wide freedom afforded religious groups under the First Amendment. King's Garden characterizes the above cases as follows:

> Central to the Court's holding in the cited cases is that any governmental intrusion into religious beliefs and practices is permissible only when absolutely essential by reason of some other overriding public necessity; and, further, that even in those cases the government must give the widest possible effect to varying views and philosophies.

To avoid these alleged Constitutional questions, King's Garden urges that its employment practices be declared wholly permissible.

8. King's Garden's contentions go to alleged interference with the practice of its religion. We are dealing, therefore, with the free exercise clause of the First Amendment. Generally, we can state that reasonable, nondiscriminatory regulations governing the conduct of King's Garden, as distinguished from its beliefs, are Constitutionally permissible, *U.S. v. Kissinger*, 250 F.2d 940 (3rd Cir. 1958). Furthermore, the Supreme Court has stated, ". . . it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *School District of Abington v. Schempp*, 374 U.S. 203, 223 (1963). We note first that King's Garden can practice its religion without holding a broadcast license. Second, there is no "coercive effect" here, since we did not compel King's Garden to become a licensee. (This fact distinguishes *Wisconsin v. Yoder*, above.) "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations," *United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). King's Garden, having voluntarily sought a license and the privileges that go with it, can not now be heard to argue that it can avoid the public obligations imposed on all licensees because it is "coerced." If King's Garden is not willing to accept its obligations, as set out in the rules in question, it need not retain its license.

9. We exempted from the nondiscrimination rules those employed by King's Garden to espouse its particular religious philosophy over the air. King's Garden contends that this puts us into the position of defining religious philosophy. We are not called upon at this point to make that definition. In any event, while admittedly an area requiring circumspection, definitions as to what constitutes a re-

ligious philosophy or activity have frequently been dealt with in the courts and by administrative agencies.[4] For example, cases involving draft deferments on religious grounds[5] and tax cases where church properties are exempt from property taxes often involve questions as to what is or is not a religious belief or activity. When and if the question should be presented to us, it can be answered without treading on First Amendment rights.

10. We have never recognized a right of religious organizations holding broadcast authorizations to use a station solely to promote their own religious views. As we noted in our prior decision, the two stations must be operated in the public interest, not solely in the interest of its particular religion.[6] King's Garden must ascertain secular community problems and needs, and devote a portion of its broadcast time to meet those problems and needs. See our *Report and Order in Docket No. 18774*, in which we adopted the Primer on the ascertainment of community problems by broadcast applicants, 27 FCC2d 650, 652-3 (1971). It must also have a policy of making time available for the presentation of other religious views, *Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938). Thus, in our prior decision, we did not fail to consider King's Garden's contentions

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[4] The interpretation requested by King's Garden does not resolve the definition problem. The question as to what is or is not a religious organization would still remain.

[5] *U.S. v. Seeger* and *Welsh v. U.S.*, cited in paragraph 5, are examples of such cases.

[6] See *James A. Noe & Co. v. FCC*, 260 F.2d 739 (D.C. Cir. 1958), where the Court stated that in determining whether a particular station would meet the problems and needs of a community, the religious orientation of the applicant is an irrelevant factor.

that it considered its broadcast activities to be part of its religious activities. We considered the contention and rejected it as erroneous.

11. In view of the above, we shall affirm our prior decision in this matter. Moreover, we are concerned with the apparent equation of broadcast and religious activities made by King's Garden. This raises a question as to its compliance with the policy set out in the *Young People's* case, above. Therefore, we shall also require King's Garden to submit a statement as to its policies as to making time available for the presentation of religious views other than its own.

12. Accordingly, IT IS ORDERED, That King's Garden, Inc., is directed to submit within twenty (20) days of the release of this Memorandum Opinion and Order, (a) a statement as to its future hiring practices and policies with respect to the requirements of Sections 73.125 and 73.301, and (b) a statement as to its policy with respect to making time available for the presentation of other religious views.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

APPROVED IN COMMISSION MEETING
November 22, 1972

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 FCC 72-387
May 3, 1972 75863

In reply refer to:
8300-S
C10-462

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

King's Garden, Inc.
Radio Station KGDN
19303 Fremont, North
Seattle, Washington 98133

Gentlemen:

This is in reference to: (a) the letter of July 19, 1971, of Mr. Trygve J. Anderson alleging discriminatory hiring practices by stations KGDN(AM) and KBIQ-FM, Edmonds, Washington, both of which are licensed to you; and (b) your responses to that letter filed September 20 and October 12, 1971.

In his letter, Mr. Anderson states that in seeking employment at your stations, he was asked; "Are you a Christian?", "How do you know you are a Christian?", "Is your spouse a Christian?", and "Give a testimony." Mr. Anderson further states that, "Such questions obviously have no bearing on a person's ability to handle a job in broadcasting, and could only be used to discriminate against potential employees because of their religious beliefs." Mr. Anderson requests, therefore, that your stations be required to delete all requests for religious preferences and beliefs from their employment applications. Mr. Anderson sought a job with you as an announcer or newsman.

Mr. Anderson's letter raises a question as to compliance with Sections 73.125 and 73.301 of the Commission's

Rules, which prohibit licensee employment policies that discriminate on the basis of race, color, religion, national origin or sex. In your response, you indicate that 78 percent of Station KGDN's programming is "inspirational," and that Station KBIQ-FM's format is primarily "good music," which serves as a vehicle for the hourly airing of "brief essays stimulating a desire for higher moral and spiritual values." You state that you are a Christian religious organization with a mission to "share Christ." Since Stations KGDN and KBIQ-FM are a part of your overall program, you assert that it is necessary to inquire of prospective employees whether they subscribe to your objectives. You deny, however, that your inquiries violate the Commission's rules.

In support of your position, you state that our nondiscrimination rules were based on the Civil Rights Act of 1964. That Act exempts from its provisions religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its religious activities . . . ." 42 U.S.C. 2000e-1. You also quote 42 U.S.C. 2000e-2(e), which provides that it is not an unlawful employment practice to classify an individual "on the basis of his religion, sex, or national origin in those certain circumstances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Finally, you cite the interpretive memorandum submitted to the Senate by Senators Clark and Case, floor managers for the bill, during the debate on the Civil Rights Act. That memorandum states with respect to the "occupational qualification" exception stated in 42 U.S.C. 2000e-2(e):

> This exception is a limited right to discriminate on the basis of religion, sex or national original where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion. (110 Congressional Record 7213)

In essence, you argue that your employees "perform work connected with . . . [your] religious activities" and you are exempt under the provisions of 42 U.S.C. 2000e-1, and that religious qualifications are a "bona fide occupational qualification" within the meaning of 42 U.S.C. 2000e-2(e).

It should be noted, however, that in your role as a licensee of the Commission, you do not exist solely to espouse a particular religious philosophy. You are required to operate in the public interest, as defined by the Commission's rules and policies. You are also required to have a policy of making time available for the presentation of other, including non-Christian, religious views, *Young People's Association for the Propagation of the Gospel,* 6 FCC 178 (1938). Clearly, therefore, all work performed by employees of Stations KGDN and KBIQ-FM is not connected with the carrying on of their religious activities. Moreover, the Commission does not believe that religion is a qualification that is "reasonably necessary" to all aspects of the stations' normal operations. In keeping with the exemptions you cite from the Civil Rights Act of 1964, the Commission believes that those persons hired to espouse a

particular religious philosophy over the air should be exempt from the nondiscrimination rules. But also in keeping with the very limited nature of the exemptions afforded by the 1964 Act, the Commission does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views. As to sales personnel, it should be noted that the sale of commercial time to the business community at large does not come within the example given in the Senate interpretive memorandum, quoted above.

In sum, your hiring policy discriminates on the basis of religion as to all station personnel, and is not, therefore, in compliance with Sections 73.125 and 73.301 of the Commission's rules. To hold otherwise would strike the word "religion" from those rules as to any station licensed to a religious organization.

This is a case of first impression and no sanction will, therefore, be imposed. You are directed, however, to submit within 20 days a statement of your future hiring practices and policies with respect to the requirement of Sections 73.125 and 73.301, as interpreted by this letter.

Commissioner Bartley not participating; Commissioner Reid absent.

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

cc: Mr. Trygve J. Anderson
Cohen and Berfield

Approved in Commission Meeting
May 3, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-71

THE KING'S GARDEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 498 F. 2d 51. The letter-decision of the Federal Communications Commission, (Pet. App. 30a-33a) is reported at 34 FCC 2d 937. The memorandum opinion and order of the Commission (Pet. App. 22a-29a) is reported at 38 FCC 2d 339.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 6, 1974. The petition for a writ of certiorari was filed on August 5, 1974. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a decision of the Federal Communications Commission requiring a radio broadcast licensee, which is also a religious organization, not to discriminate on religious grounds in hiring broadcast personnel was a reasonable exercise of its public interest responsibilities under the Communications Act of 1934, which neither conflicts with the Equal Employment Opportunity Act of 1972 nor violates the First Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment of the Constitution is set forth at Pet. 3. Section 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) 2000e–1 (Supp. II) is also set forth at Pet. 3. Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U.S.C. 303, and Sections 73.125 and 73.301 of the Rules of the Commission, 47 C.F.R. 73.125 and 73.301, are set forth at Pet. 3–4.

STATEMENT

1. Petitioner, The King's Garden, Inc., is the licensee of radio stations KBIQ–FM and KGDN in Edmonds, Washington. King's Garden is a nonprofit, interdenominational religious and charitable organization which asserts that its basic goal is to "share Christ world wide" (Pet. 4). It insists that all personnel of its stations share its religious views and, to that end, asks job applicants such questions as "Are

you a Christian?" "How do you know you are a Christian?" "Is your spouse a Christian?," and requests them to "Give a testimony."

This practice came to light in mid-1971 when a Mr. Trygve Anderson, who had unsuccessfully applied to King's Garden for a job as announcer or newsman, complained to the Commission. In response to the F.C.C.'s inquiries, petitioner conceded its discriminatory hiring policy, but argued that it was permitted by Title VII of the Civil Rights Act of 1964. The Commission found that petitioner was violating the F.C.C.'s anti-bias rules and required it to end its religious discrimination except only with respect to "those persons hired to espouse a particular religious philosophy over the air" (Pet. App. 30a–33a).[1] Subsequently, petitioner requested the Commission to reconsider its ruling in light of the recently enacted 1972 amendment to Title VII of the Civil Rights Act.[2] In an opinion released November 30, 1972, the Commission reaffirmed its prior decision. It stated that it would not modify its anti-bias rules except in a rule-making proceeding and then only "upon a public

[1] Petitioner was ordered to submit a statement of its future hiring practices which would be consistent with the F.C.C. anti-bias rules.

[2] Prior to this amendment, Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, exempted religious organizations from the requirements of the Act "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its *religious* activities * * *" (emphasis added). The 1972 amendment deleted the word "religious."

interest finding under the Communications Act" (Pet. App. 26a).[3]

The Commission noted that its authority comes from the Communications Act and not the Civil Rights Act. Under its statutory mandate, it has the power to determine whether licensee conduct is related to broadcasting in the public interest and its anti-bias rules for licensees are considerably broader than the Civil Rights Act.[4] Finally, the Commission determined that the 1972 amendment to the Civil Rights Act did not require any changes in its anti-bias rules since that amendment did not alter its mandate under the Communications Act. It also rejected petitioner's claim that the anti-bias rules violated the Free Exercise Clause of the First Amendment.

2. On petition for review the court of appeals affirmed the F.C.C. rulings.[5] The majority opinion suggested that the 1972 amendment to the Civil Rights Act may violate the Establishment Clause of the First

[3] King's Garden had filed a Petition for Rulemaking advocating an amendment to the F.C.C. anti-bias rules which would make them consistent with the 1972 amendment to the Civil Rights Act (Pet. App. 23a).

[4] The F.C.C. rules apply to all broadcasters regardless of size while the Civil Rights Act applies only to employers with 15 or more employees. In addition, broadcast licensees are obligated in some circumstances take strong affirmative action to hire members of minority groups. See 47 C.F.R. 73.125(b), 73.301(b), 73.599(b). 73.680(b) and 73.793(b); see also *Nondiscrimination in Employment Practices: Notice of Proposed Rulemaking*, 13 FCC 2d 766; *Nondiscrimination in Employment Practices*, 18 FCC 2d 240.

[5] The petition was filed in the Ninth Circuit and ultimately transferred to the District of Columbia Circuit.

Amendment (Pet. App. 5a).[6] However, the majority expressly declined to decide this question (Pet. App. 13a). Instead, on the basis of the legislative history of the amendment, it determined that Congress had not intended to alter the anti-bias rules of the F.C.C. Those rules were adopted pursuant to the Commission's statutory mandate under the Communications Act, which confers broad power on the agency to assure that broadcasters operate in the public interest. The court also noted that the Commission had examined the amendment to determine if it had any relevancy to its mandate and had determined that no change in its rules was required.

Finally, the court rejected petitioner's argument that the F.C.C.'s anti-bias rules violate the Free Exercise Clause of the First Amendment. The court observed that petitioner is subject to F.C.C. regulation only because it voluntarily sought and received a broadcast license and that such a license is "burdened by enforceable public obligations" (Pet. App. 17a). The court concluded that a religious organization cannot "convert a licensed communications franchise into a church" (*ibid.*). Focusing on the special exemption recognized by the Commission, the court observed that

[6] The court expressed doubt that the amendment had a secular purpose, suggesting instead that the amendment had the "primary effect" of advancing religion (Pet. App. 7a–8a). Finally, the court noted that the amendment may invidiously discriminate against non-religious commercial organizations in violation of the Due Process Clause of the Fifth Amendment (*id.* at 12a).

the Commission will have to determine which jobs require the espousal of religious views, that it has the expertise necessary to perform this function, and that any disputes between the Commission and a licensee over the characterization of a particular position can be resolved if and when they arise (Pet. App. 19a).

Chief Judge Bazelon concurred in the result. He did not believe that the F.C.C. could enforce employment requirements which directly conflict with the Civil Rights Act. However, since he believed that the 1972 amendment to the Civil Rights Act is unconstitutional, he agreed that the F.C.C. was not obligated to follow it (Pet. App. 21a).

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The rules of the F.C.C. are adopted pursuant to its statutory mandate as reflected in the Communications Act of 1934. Under this statute, the F.C.C. cannot issue a broadcast license unless it first determines that the public convenience, interest or necessity would thereby be served. The "mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive,' *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380.

The Commission has promulgated a number of regulations which define various aspects of broadcast

licensees' public interest responsibilities. The anti-bias rules at issue in this case were adopted because the Commission concluded that a licensee which engaged in discriminatory hiring practices could not be viewed as making a good faith effort to operate its station in the public interest. *Nondiscrimination in Employment Practices,* 13 FCC 2d 766, 769–770. These regulations reflect the public policy against racial, religious and sexual discrimination in employment, and are consistent with numerous federal and state statutes and regulations which prohibit discriminatory hiring practices,[7] which are, of course, relevant to the public interest criterion which the Commission must apply. See *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86. But it does not follow that the Commission, operating under a special statutory mandate, is compelled to tailor its rules to copy precisely every exemption announced in other laws.

There is no evidence in the legislative history of Title VII or—more relevantly—the 1972 amendment to the Civil Rights Act that Congress intended to modify the anti-bias rules of the F.C.C. These rules were simply not discussed. *Legislative History of the Equal Employment Opportunity Act of 1972,* Senate Labor and Public Welfare Committee (1972). In fact, this legislative history indicates that the primary purpose of the amendment was to restrict the authority

[7] See, *e.g.*, 42 U.S.C. 1981, 2000e, *et seq.*; Exec. Order No. 11246, 30 Fed. Reg. 12319; Ann. Code of Md., Art. 49B, § 19.

of the Equal Employment Opportunity Commission to oversee the hiring practices of private educational institutions controlled by religious organizations (*id.* at 843–852). The decision to exempt those organizations from regulation by E.E.O.C. cannot, without more, be read as intending a broad immunity from *all* regulations.

The F.C.C. has it own statutory mandate which requires it to consider broader public interest considerations. Of course, it should carefully examine the effect of the amendment on its anti-bias rules. That has been done in this case. We submit that the Commission's decision not to alter its rules except in the context of a rulemaking proceeding was proper. Cf. *American Commercial Lines, Inc.* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 590–591.

2. The F.C.C.'s anti-bias rules do not violate petitioner's rights under the Free Exercise Clause of the First Amendment. Petitioner is a broadcast licensee and as such possesses no greater rights than any other broadcast licensee. "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* 395 U.S. at 394. Once a licensee has sought and been "granted the free and exclusive use of a limited and valuable part of the public domain," the license it receives "is burdened by enforceable public obligations." *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1003 (C.A.D.C.); see also *Brandywine-Main Line Radio, Inc.* v. *Federal Com-*

munications Commission, 473 F. 2d 16 (C.A.D.C.), certiorari denied, 412 U.S. 922. These "enforceable public obligations" have been imposed on all other broadcast licensees only because they voluntarily decided to engage in broadcasting. Petitioner cannot claim a wholesale exemption merely because it is a religious organization.

What is more, the F.C.C.'s anti-bias rules expressly recognize Petitioner's First Amendment rights. The Commission has withheld application of its anti-bias rules with respect to those employees hired to espouse "a particular religious philosophy over the air * * *." ~~recognize petitioner's First Amendment rights. The~~ "a particular religious philosophy over the air * * *" (Pet. App. 32a–33a). On its face, this exemption is sufficiently broad to protect petitioner's rights under the Free Exercise Clause of the First Amendment because it permits it to hire employees sympathetic to its religious orientation to espouse its religious views over the air. As the court below noted, while this exemption will require the F.C.C. to determine what jobs involve the espousal of religion, the Commission has traditionally been permitted to apply its expertise in the field of broadcasting to complex First Amendment problems. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102–103; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, *supra*, 395 U.S. at 386–401. To argue that this evaluation procedure may result in excessive entanglement of church and state ignores the fact that petitioner's relationship with the F.C.C. arises not from its status as a church but from its

status as a federally regulated broadcast licensee which also happens to be a religious organization.

Regardless of the licensee's religious affiliation, the Commission is responsible under the Communications Act for assuring that its station is operated in the public interest. Petitioner's religious affiliation gives it no exemption either from the Communications Act or from Commission regulations thereunder.[8] Indeed, were it to enjoy such a special status, serious questions might arise under the Establishment Clause, which "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette* v. *United States*, 401 U.S. 437, 450.

Petitioner has not claimed in this record that its discriminatory hiring practices are necessary in order for its principals to practice their religion. Compare *Wisconsin* v. *Yoder*, 406 U.S. 205; *Sherbert* v. *Verner*, 374 U.S. 398; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Cantwell* v. *Connecticut*, 310 U.S. 296. Nor is it evident why the limited exemption granted by the Commission is not fully sufficient to permit petitioner

[8] All broadcast licensees including religious licensees are required to ascertain community problems and devote portions of their programming toward meeting those problems. In addition, they must abide by the fairness doctrine and live up to their programming representation. The licensee must meet the needs of the community as a whole, not a particularized segment of it. See generally *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650; *Young People's Association for Committee* v. *Federal Communications Commission*, 467 F. 2d 408 (C.A.D.C.); *Brandywine-Main Line Radio, Inc.* v. *Federal Communications Commission*, *supra*.

freely to carry out its religious mission. The Free Exercise Clause requires no more.

3. Finally, petitioner contends that this Court should review this case in order to determine the constitutionality of the 1972 amendment to the Civil Rights Act. The short answer is that the question was not decided below and is unnecessary to the disposition of the case. It is thus not properly tendered here, and, this Court should not accept petitioner's invitation prematurely to decide the issue. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974